



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 5

77 WEST JACKSON BOULEVARD
CHICAGO, IL 60604-3590

MAR 20 2003

REPLY TO THE ATTENTION OF
(R-19J)

Melissa K. Scanlan
Midwest Environmental Advocates, Inc.
702 East Johnson Street
Madison, Wisconsin 53703

Bruce E. Nilles
Sierra Club Midwest Office
214 North Henry Street
Madison, Wisconsin 53704

RE: "Petition Seeking The U.S. EPA To Protect Wisconsin Families
From Air Pollution By Issuing The State A Notice Of
Deficiency For Failing To Adequately Administer Its Title V
Permit Program"

Dear Ms. Scanlan and Mr. Nilles:

On December 16, 2002, the United States Environmental Protection Agency (U.S. EPA) received the above-captioned petition (Petition) from the Sierra Club Midwest Office and Midwest Environmental Advocates, Inc. (Petitioners), requesting that U.S. EPA issue a notice of deficiency (NOD) to the State of Wisconsin for Wisconsin's alleged failure to adequately administer its Clean Air Act (CAA) Title V permit program.

The Petition alleges the following four deficiencies in Wisconsin's program: (1) Failure to timely act on major source permit applications; (2) failure to charge sufficient Title V permit fees; (3) illegally using grant money for Title V activities; and (4) failure to adequately enforce its Title V program. Accordingly, Petitioners have requested that U.S. EPA issue a NOD pursuant to 40 C.F.R. 70.10.

With respect to the two funding issues raised, Petitioners argue that Wisconsin is not using U.S. EPA's presumptive fee schedule and, therefore, is in violation of the requirement to submit to U.S. EPA a detailed fee schedule to demonstrate that its fees are adequate. Petitioners further argue that Wisconsin is violating the requirement that only permit fee revenue may be used to fund its Title V program.

On December 6, 2002, U.S. EPA sent a letter to Wisconsin Secretary Bazzell requiring the Wisconsin Department of Natural Resources (WDNR) to submit the following information regarding its Title V fee structure: (1) A complete description of the State fee structure, and updated rules and/or statutes; (2) a demonstration that Wisconsin's fee schedule results in the collection and retention of revenues sufficient to cover the operating permit program costs; and (3) a description of the operating permit program activities and costs, and a description of the activities funded by part 70 fees, including personnel.

The WDNR responded to U.S. EPA's request with a March 3, 2003, letter from Secretary Scott Hassett containing much of the required fee analysis information. In its letter, WDNR stated that it would submit the information pertaining to itemized Title V Program costs by March 31, 2003. The U.S. EPA has begun its analysis of the State's fee structure by reviewing the information submitted on March 3, 2003, and WDNR's Section 105 grant agreement with respect to which activities are funded by Title V fees and which are funded by the Section 105 grant. To make its determination U.S. EPA will also need to review the information Wisconsin plans to submit by March 31, 2003. Once U.S. EPA has completed these analyses, and determined whether or not a NOD is warranted on these two issues, U.S. EPA will share its conclusions with Petitioners.

With respect to the concern regarding permit issuance, Petitioners state that the WDNR is violating the CAA requirement that each State take final action on all initial Title V permit applications within three years after U.S. EPA's approval of that State's Title V program, and that WDNR is violating the requirement at 40 C.F.R. 70.7(a)(2) that it act within 18 months on each Title V subsequent permit application that it receives. The U.S. EPA believes that it is appropriate to make its review of Wisconsin's permit issuance practices concurrent with U.S. EPA's review of Wisconsin's Title V program funding practices. This is because the State's permit issuance rate may be affected by its Title V program funding. Accordingly, U.S. EPA's determination regarding whether a NOD is warranted regarding Wisconsin's Title V permit issuance practices will be made concurrently with its determinations regarding Wisconsin's fee collection and grant use practices as described above.

The U.S. EPA has investigated the enforcement issues raised in the petition. Based on trend data U.S. EPA concludes that this issue does not warrant a NOD. The U.S. EPA Region 5 gathered statistics relative to WDNR's compliance with the following U.S. EPA enforcement policies: "Compliance Monitoring Strategy," the

"Timely and Appropriate Response to High Priority Violations," and the "Clean Air Act Stationary Source Civil Penalty." Statistics gathered included: Reviewing the number of Title V facilities in the State, the number of inspections of those facilities performed to date, the number of violations identified in those inspections, and the nature and number of follow up actions/enforcement actions taken by the State. Based on this data, U.S. EPA concludes that the Petitioners' allegations do not support the issuance of a NOD regarding Wisconsin's Title V enforcement practices. A copy of U.S. EPA's analysis is attached.

The U.S. EPA will continue to assess Wisconsin's enforcement program. To the extent that there are recent declines in enforcement and compliance activities which are due to resources, U.S. EPA will address this through its fee analysis, as described above.

Lastly, with respect to Wisconsin's permit program budget, Wisconsin Governor Doyle proposed a new 2003-2005 biennium budget on February 18, 2003. U.S. EPA was discouraged to learn that there are changes in this budget proposal that may decrease air program funding, and negatively impact the State's Title V program in particular. If there are changes in air program funding relevant to the Title V program in the final enacted budget, then WDNR will need to supplement its fee demonstration to reflect these changes.

As soon as U.S. EPA has completed the necessary analyses, U.S. EPA will respond to both the Sierra Club Midwest Office and Midwest Environmental Advocates, Inc., as well as to all other interested parties. If you have any questions, please contact me.

Very truly yours,

**/s/ original signed by
Bharat Mathur**

Thomas V. Skinner
Regional Administrator

Enclosure

CC: Lloyd Eagan, Director
Wisconsin Bureau of Air Management

**U.S. EPA's Evaluation of the Enforcement Issues
Raised by the Sierra Club Petition**

Sierra Club's Allegations

The Sierra Club cites the following reasons that WDNR's Title 5 enforcement program is inadequate: (1) during the past 26 months, WDNR has not settled a single administrative case and in the period 1995-2000, WDNR issued eleven administrative orders; (2) WDNR has not commenced a single criminal enforcement action in the history of the Title 5 program; (3) the judicial enforcement program is weak in that for the first nine months of 2002, WDNR referred only three cases to the Department of Justice for enforcement; (4) the WDNR has a backlog of 169 unresolved Title 5 enforcement cases since 1995; and (5) there is a lack of funding for the compliance/enforcement program. We will address all of these points.

WDNR Administrative Orders

Regarding WDNR's administrative settlements, it is important to note that, by statute, WDNR does not have administrative penalty authority. Because WDNR does not have administrative penalty authority, WDNR's method for formal case resolution is a referral of "High Priority Violators," determined by U.S. EPA's "Timely and Appropriate Enforcement Response to High Priority Violations (HPV policy)," to the State Attorney General's (AG) office (when appropriate). These referrals are followed by the issuance of judicial orders. The judicial order would be issued to require penalties and the implementation of any necessary injunctive relief to achieve or maintain compliance. WDNR could not settle a case administratively if the case required either penalties and/or injunctive relief, and so the use of Administrative Orders is limited. The Administrative Orders referred to by the petitioner were most likely issued for the purpose of putting companies on schedules for reporting, monitoring, etc. These types of situations may not warrant formal resolution.

WDNR Judicial Orders

The following are the numbers of judicial orders which were issued by the State AG on behalf of WDNR (for cases previously referred by WDNR): In FY 2000, the State AG, on behalf of WDNR, issued 13 judicial orders, with total penalties of \$793,428. In FY 2001, the State AG issued 18 judicial orders, with total penalties of \$1,150,454. In FY 2002, the State AG issued 8 judicial orders, with total penalties of \$ 616,028. Although U.S. EPA does not review every penalty calculated by the State, WDNR in its referrals to the AG follows the main principles of

the HPV policy and the "CAA Stationary Source Civil Penalty Policy" which require an economic benefit component assessment and a gravity component assessment as part of each penalty calculation. The number of WDNR referrals to the State AG in the last three fiscal years were: for FY 2000: 9; for FY 2001, 16; for FY 2002, 11.

The fact that WDNR issued only 3 cases to the AG in the first 9 months of 2002 is irrelevant because the time frame is arbitrary and does not consider the entire fiscal year. Furthermore, fluctuation in enforcement numbers from year-to-year is expected to a certain degree and dependent on a variety of factors. Finally, WDNR's annual average number of referrals over a 5-year time period has increased substantially since the early 1990's. From FY 1990-1994, WDNR's annual average number of referrals was 6.4. From FY 1998-2002, WDNR's annual number of referrals was 13.4.

Regarding criminal cases, we are not aware of any criminal cases that WDNR has had in the history of the Title 5 program. However, the existence or non-existence of a criminal case is related to a variety of factors such as whether evidence obtained through an investigation is sufficient for bringing forth a criminal suit.

Unresolved Cases

Regarding unresolved cases, it is important to note that a violation may have been addressed through issuance of a judicial order or issuance of an Administrative Order, but not be resolved until the order expires. For example, U.S. EPA checked its AIRS Facility Subsystem (AFS) Database for the 72 NOV's which were part of the 169 total unresolved case list. We found that 10 of the 72 NOV's were followed up with referrals or Administrative Orders. Another 10 cases were closed out without a formal resolution.

It is also likely that some of the cases listed have actually been resolved or closed out but that status has not been recorded into the database. Also, it is not uncommon for a case to take months or even years to be completely resolved depending on the complexity, requirements to achieve and maintain compliance, and the amount of penalties.

Compliance Program

One issue not brought up the petitioner was the number of inspections conducted by WDNR. U.S. EPA is concerned about WDNR's funding levels for its compliance program. We have seen

the number of WDNR inspections decrease over the years and WDNR attributes this to lack of resources. For instance, in FY 2002, WDNR performed 316 Level 2 inspections. But in FY 1995, WDNR performed 505 Level 2 inspections. WDNR has also recently informed U.S. EPA that the State will not be able to meet the federal requirement to conduct full compliance evaluations (FCEs) of major sources every two years.

However, U.S. EPA's "Compliance Monitoring Strategy" allows the State to complete FCEs over a longer period than 2 years upon mutual agreement by the State and U.S. EPA. In that regard, WDNR is in the process of developing a plan for that would prioritize its inspections over a 2-year period so that more significant facilities would be addressed first.

Conclusion

From U.S. EPA's data, we do not believe that the Sierra Club allegations support a notice of deficiency. As noted above, we have seen recent improvements in WDNR's enforcement program. We do have a concern that WDNR may be closing out too many cases each year without formal resolutions and penalties (55 in FY 2000, 31 in FY 2001, and 52 in FY 2002). However, we believe this issue as well as any others could be addressed through further discussions with WDNR, as well as agreements memorialized through the PPA/EnPPA negotiation process. We are concerned about the State's recent decline in inspections, which it attributes to resource constraints. We will be working to negotiate WDNR's inspection strategy that will cover the next 2-year planning cycle.

U.S. EPA will continue to assess WDNR's compliance and enforcement program and as concerns arise, we will work with the State to get them resolved. Should resource constraints further impact the State's ability to support an effective compliance and enforcement program, U.S. EPA will address the issue as appropriate.